

# **BRANDT HEIGHTS 1ST**

## **CONDITIONAL ANNEXATION AND ZONING AGREEMENT**

This Brandt Heights 1st Conditional Annexation and Zoning Agreement ("Agreement") is made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2004, by and between **Ronald A. Tonniges and Marva R. Tonniges**, hereinafter collectively referred to as "Owner," and the **City of Lincoln, Nebraska**, a municipal corporation, hereinafter referred to as "City."

### **R E C I T A L S**

A. Owner has requested the City to annex approximately 3.979 acres more or less of land generally located north and south of Norval Road and east of 84th Street. The approximately 3.979 acres is hereinafter referred to as the "Property" and is legally described as:

A portion of Lot 2, Brandt Estates, located in the NW 1/4 of Section 35, Township 10 North, Range 7 East of the 6th Principal Meridian, Lincoln, Lancaster County, Nebraska, and more fully described as follows:

Referring to the northeast corner of Lot 3, Block 1, Brandt Heights Addition Replat, said point being the point of beginning; thence on an assumed bearing of south 89 degrees 24 minutes 34 seconds east, 241.93 feet; thence south 00 degrees 08 minutes 51 seconds west, 395.37 feet; thence north 89 degrees 50 minutes 50 seconds west, 242.26 feet; thence north 00 degrees 11 minutes 10 seconds east, 195.00 feet (195.2' platted); thence south 89 degrees 51 minutes 09 seconds west, 121.00 feet; thence north 00 degrees 12 minutes 37 seconds east, 90.00 feet; thence north 89 degrees 51 minutes 09 seconds west, 121.00 feet; thence north 00 degrees 11 minutes 55 seconds east, 112.24 feet (112.25' platted) to the point of beginning and containing 1.953 acres more or less.

AND

Referring to the southeast corner of Lot 31, I.T., said point being the point of beginning; thence on an assumed bearing of north 00 degrees 05 minutes 48 seconds east, 130.17 feet (130.2' platted); thence south 89 degrees 45 minutes 37 seconds east, 121.00 feet; thence north 00 degrees 23 minutes 36 seconds east, 90.00

feet; thence north 89 degrees 45 minutes 37 seconds west, 121.00 feet; thence north 00 degrees 02 minutes 14 seconds east 120.51 feet (120.7' platted); thence south 89 degrees 56 minutes 39 seconds east, 289.99 feet; thence south 00 degrees 11 minutes 43 seconds west, 343.44 feet; thence north 89 degrees 23 minutes 52 seconds west, 289.75 feet to the point of beginning and containing 2.026 acres, more or less.

B. Owner has requested the City to approve the preliminary plat for Brandt Heights 1st Addition.

C. Owner has requested the City to approve Change of Zone No. 04010 rezoning the Property along with an additional one-half acre from AG Agriculture District to R-1 Residential District.

D. The City has adopted Ordinance No. 18113, hereinafter referred to as the "Impact Fee Ordinance" based upon an Impact Fee Study prepared by Duncan Associates dated October, 2002, that will go into effect on June 2, 2003. This Impact Fee Ordinance will enable the City to impose a proportionate share of the cost of improvements to the water and wastewater systems arterial streets and neighborhood parks and trails necessitated by and attributable to new development.

E. A Complaint for Declaratory and Injunctive Relief has been filed in the District Court of Lancaster County, Nebraska. This Complaint prays for judgment of the district court declaring the Impact Fee Ordinance invalid and unenforceable and for injunctive relief enjoining the imposition of impact fees.

F. The City is willing to annex the Property, approve the preliminary plat, and approve the change of zone as requested by Owner, prior to a determination as to the validity and enforceability of the Impact Fee Ordinance, provided Owner agrees to make a guaranteed nonrefundable contribution to the cost of improving the City's Water System, Water Distribution, Wastewater System, Neighborhood Park & Trail, and Arterial Street Impact Fee Facilities necessitated by and attributable to the proposed development of the Property in the event the Impact Fee Ordinance is held invalid or is otherwise unenforceable.

NOW, THEREFORE, in consideration of the mutual covenants contained herein, the parties do agree as follows:

**1. Annexation by the City.** The City agrees to annex the Property.

**2. Preliminary Plat.** The City agrees to approve the preliminary plat of Brandt Heights 1st Addition.

**3. Change of Zone 04010.** The City agrees to approve Change of Zone No. 04010, rezoning the Property from AG Agriculture District to R-1 Residential District.

**4. Contributions for Impact Fee Facility Improvements.**

A. Water Distribution Impact Fee Facility Contribution. Owner agrees to contribute \$3,922.32 toward the cost of making Impact Fee Facility Improvements to the City's Water Distribution Impact Fee Facilities attributable to the proposed development of the Property.

B. Water System Impact Fee Facility Contribution. Owner agrees to contribute \$6,327.68 toward the cost of making Impact Fee Facility Improvements to the City's Water System Impact Fee Facilities attributable to the proposed development of the Property.

C. Wastewater Impact Fee Facility Contribution. Owner agrees to contribute \$5,125.00 toward the cost of making Impact Fee Facility Improvements to the City's Wastewater Impact Fee Facilities attributable to the proposed development of the Property.

D. Neighborhood Park and Trail Impact Fee Facility Contribution. Owner agrees to contribute \$2,123.00 toward the cost of making Impact Fee Facility Improvements to the City's Neighborhood Park and Trail Impact Fee Facilities attributable to the proposed development of the Property.

E. Arterial Street Impact Fee Facility Contribution. Owner agrees to contribute \$16,313.00 toward the cost of making Impact Fee Facility Improvements to the City's Arterial Street Impact Fee Facilities attributable to the proposed development of the Property.

The Contributions for the above-described Impact Fee Facility Improvements reflect the amounts attributable to 100% development of the proposed development of the Property in 2004 based upon the 2004 Impact Fee Schedules for said Impact Fee Facilities.

**5. Future Cost Responsibilities.** Owner understands and acknowledges that it is the City's position that the Impact Fee Facility Contributions by Owner under paragraph 4 of this Agreement do not address all the impacts the proposed development of the Property will have on the City's Impact Fee Facilities as set forth in the Impact Fee Study prepared by Duncan Associates dated October, 2002. Therefore, Owner understands that the proposed development of the Property shall be subject to the payment of impact fees.

**6. Guaranteed Payment of Contributions.**

A. Water Distribution, Water System, Wastewater, Neighborhood Park & Trail, and Arterial Street Impact Fee Facility Contributions. Owner shall, prior to the approval of each final plat of the Property, provide the City a bond, escrow, letter of credit, or other security agreement approved by the City Attorney in an amount equal to a proportionate share of the Water Distribution, Water System, Wastewater, Neighborhood Park & Trail, and Arterial Street Impact Fee Facility Contributions attributable to full development of the lots within each final plat compared to the approved full development of the Property under this Agreement. Owner's proportionate payments of the Water Distribution, Water System, Wastewater, Neighborhood Park & Trail, and Arterial Street Impact Fee Facility Contributions shall be paid to City within thirty days written notice from the City that the following two events have occurred: (i) the City has awarded a bid and entered into a contract for the improvement of an eligible Water Distribution, Water System, Wastewater, Neighborhood Park and Trail, and/or Arterial Street Impact Fee Facility Improvement, and (ii) a final judgment of a court of competent jurisdiction has declared the Impact Fee Ordinance invalid and unenforceable.

B. In the event a final judgment of a court of competent jurisdiction has declared the Impact Fee Ordinance valid and enforceable, the City agrees to release the bond, escrow, letter of credit, or other security agreement provided by Owner to guarantee the above-described Contributions.

**7. Binding Effect.** This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, devisees, personal representatives, successors and assigns and shall inure to and run with the Property.

**8. Amendments.** This Agreement may only be amended or modified in writing signed by the parties to this Agreement.

**9. Further Assurances.** Each party will use its best and reasonable efforts to successfully carry out and complete each task, covenant, and obligation as stated herein. Each of the parties shall cooperate in good faith with the other and shall do any and all acts and execute, acknowledge, and deliver any and all documents so requested in order to satisfy the conditions set forth herein and carry out the intent and purposes of this Agreement.

**10. Governing Law.** All aspects of this Agreement shall be governed by the laws of the State of Nebraska. The invalidity of any portion of this Agreement shall not invalidate the remaining provisions.

**11. Interpretations.** Any uncertainty or ambiguity existing herein shall not be interpreted against either party because such party prepared any portion of this Agreement, but shall be interpreted according to the application of rules of interpretation of contracts generally.

**12. Construction.** Whenever used herein, including acknowledgments, the singular shall be construed to include the plural, the plural the singular, and the use of any gender shall be construed to include and be applicable to all genders as the context shall warrant.

**13. Relationship of Parties.** Neither the method of computation of funding or any other provisions contained in this Agreement or any acts of any party shall be deemed or construed by the City, Owner, or by any third person to create the relationship of partnership or of joint venture or of any association between the parties other than the contractual relationship stated in this Agreement.

**14. Assignment.** In the case of the assignment of this Agreement by any of the parties, prompt written notice shall be given to the other parties who shall at the time of such notice be furnished with a duplicate of such assignment by such assignor. Any such assignment shall not terminate the liability of the assignor to perform its obligations hereunder, unless a specific release in writing is given and signed by the other parties to this Agreement.

**15. Default.** Owner and City agree that the annexation, preliminary plat, and change of zone promote the public health, safety, and welfare so long as Owner fulfills all of

the conditions and responsibilities set forth in this Agreement. In the event Owner defaults in fulfilling any of its covenants and responsibilities as set forth in this Agreement, the City may in its legislative authority rezone the Rezoned Property to its previous designation or such other designations as the City may deem appropriate under the then existing circumstances, or take such other remedies, legal or equitable, which the City may have to enforce this Agreement or to obtain damages for its breach.

**16. Definitions.** For purposes of this Agreement, the words and phrases "cost" or "entire cost" of a type of improvement shall be deemed to include all design and engineering fees, testing expenses, construction costs, publication costs, financing costs, and related miscellaneous costs. For the purposes of this Agreement the words and phrases "building permit", "development", "Impact Fee Facility", "Impact Fee Facility Improvement", and "site-related improvements" shall have the same meaning as provided for said words and phrases in the Impact Fee Ordinance.

**17. Fair Share.** The City believes that it has a legitimate interest in the public health, safety and welfare and in providing for the safe and efficient movement of vehicles on the public arterial streets and the provision of adequate water and wastewater service an adequate neighborhood parks and trails as provided for in the Impact Fee Ordinance which is promoted by requiring Owner to pay its fair share of the cost to construct such Impact Fee Facilities and that an essential nexus exists between the City's legitimate interests and the conditions placed upon Owner under this Agreement. In addition, City has made an individualized determination and found that the conditions placed upon Owner under this Agreement are related both in nature and extent and are in rough proportionality to the projected adverse effects full development of the Property under the annexation, preliminary plat, and Change of Zone No. 04010 would have on the City's Impact Fee Facilities.

**18. Reservation of Rights and Waivers.** Notwithstanding any other provision of this Agreement, Owner reserves the right to sue the City to determine the validity of the provisions of this Agreement which relate to Impact Fee Facilities. No provision of this Agreement which recites Owner's understanding that Owner's development will be subject to payment of impact fees, or acknowledges that Impact Fee Facility Contributions required by this

Agreement do not address all the impacts the proposed development of the Property will have on Impact Fee Facilities, shall have the effect of waiving Owner's rights to a judicial determination of the essential nexus, rough proportionality or other issue of federal or state constitutionality of such requirements and/or the procedure by which Owner's applications were approved, or the validity of such requirements under the Statutes of Nebraska, the Lincoln City Charter, or Lincoln Municipal Code. In consideration of the foregoing reservation of rights, and notwithstanding such reservation, Owner releases and discharges the City, all past, present and future members of the City Council of the City, in their official and individual capacities, the past or present Mayor or any department director, and all other officers agents, and employees of the City in their official and individual capacities from any and all causes of action for money damages, penalties or attorneys fees which Owner may now have with respect to or arising from Owner's request for annexation and applications for preliminary plat and change of zone approval described in Recitals A, B, and C of this Agreement and the City's negotiations, considerations and actions taken thereon, including but not limited to: a) claims for violation of Owner's rights under the United States Constitution, under 42 U.S.C. §1983 and attorneys fees under 42 U.S.C. §1988; b) claims for just compensation for a temporary taking of the Property pursuant to the Fifth Amendment of the United States Constitution and Article I, Section 21 of the Nebraska Constitution; and c) claims under the City's home rule charter, ordinances and regulations.

City acknowledges that City has included substantially identical provisions regarding Impact Fee Facilities in other "Conditional Annexation and Zoning Agreements" which also included this reservation of rights to sue the City to determine the validity of such provisions. If a lawsuit is brought challenging such provisions under any other "Conditional Annexation and Zoning Agreement" and the provisions in such agreement which relate to Impact Fee Facilities are held invalid due to lack of authority to require such provisions in exchange for annexation, preliminary plat, and/or the change of zone, the City agrees that Owner shall be entitled to the benefit of such judgment without the necessity of bringing a separate lawsuit challenging the Impact Fee Facility provisions in this Agreement, provided the statute of limitations in which to bring said lawsuit has not expired.

**19. Recordation.** This Agreement or a memorandum thereof shall be filed in the Office of the Register of Deeds of Lancaster County, Nebraska at Owner's cost and expense.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the day and year first written above.

ATTEST:

**THE CITY OF LINCOLN, NEBRASKA**  
a municipal corporation

\_\_\_\_\_  
City Clerk

By: \_\_\_\_\_  
Coleen J. Seng, Mayor

\_\_\_\_\_  
**Ronald A. Tonniges**

\_\_\_\_\_  
**Marva R. Tonniges**

STATE OF NEBRASKA       )  
  ) ss.  
COUNTY OF LANCASTER )

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2004, by Coleen J. Seng, Mayor of the City of Lincoln, Nebraska, a municipal corporation.

\_\_\_\_\_  
Notary Public

STATE OF NEBRASKA       )  
  ) ss.  
COUNTY OF LANCASTER )

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2004, by Ronald A. Tonniges and Marva R. Tonniges, husband and wife.

\_\_\_\_\_  
Notary Public